December 8, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: CS Docket No. 98-120

Dear Chairman Powell:

In meetings between the Association of Public Television Stations, the Corporation for Public Broadcasting, the Public Broadcasting Service (collectively "Public Television") and Commission staff regarding the above captioned proceeding, the issue has been raised whether noncommercial educational television broadcasters should be accorded a special status with regard to carriage of digital broadcast signals on cable. It is the position of Public Television that mandatory carriage of all free, over-the-air multicast digital broadcast programming is in the public interest and mandated by federal law, and that the Commission should act promptly to reverse its January 2001 decision and adopt such a requirement for all stations. However, if the Commission is inclined to consider tailoring digital cable carriage rules to the unique statutory, factual, economic and historical circumstances of public television stations *now*, such an approach would be fully within the Commission's authority, would be consistent with current law and Congressional intent, and would be Constitutionally permissible.

The record before the Commission demonstrates that public television stations are providing extensive noncommercial educational digital services to address diverse needs in their communities. As the Commission turns to the issues of transitional and multicast carriage, it should consider the many significant ways in which the noncommercial educational broadcast service differs from the commercial broadcast service, including not only differences in statutory treatment but also factual, economic and historical differences as well. The overarching key difference is that public broadcasting in the United States is uniquely governed by the Public Broadcasting Act and a series of statutory amendments that were enacted over a period of more than 30 years, and which taken together mandate the universal distribution of noncommercial educational services to all Americans.[1] The statutory framework of the Public Broadcasting Act makes clear that it is in the public interest for the Federal Government to ensure that all citizens have

[1] See 47 U.S.C. § 396(a).

access to public television services by all technological means.[2] Additionally, and more particularly, Public Television's cable carriage rights arise under a unique statutory provision (Section 615 of the Communications Act) with its own distinctive language, statutory context, and history.

As discussed herein, cable carriage of the full public television digital signal is warranted because:

- Section 615 is separate and distinct from the commercial carriage statute (Section 614) and includes unique terms that indicate Congressional intent to give public television broader carriage rights.

- Section 615 is properly understood as part of a unified federal scheme governing public television that conjoins cable operators' compulsory copyright license rights with mandatory carriage obligations in a way that leads to a market failure for the distribution of noncommercial educational digital broadcast programming if digital must carry rules are absent.

- Section 615 is best understood in the context of over 30 years of Congressional mandates expressing a strong governmental interest in ensuring the broadest access to all available telecommunications technologies in order to facilitate universal service.

- Public Television is the unique beneficiary of decades of federal, state and local funding – a substantial investment that itself demonstrates a compelling government interest in the preservation of the medium and counsels careful stewardship of the resources already dedicated.

- Public television stations may represent the last true bedrock of locally controlled free over-the-air media, a unique social role that requires special consideration by the Commission.

- A policy of full multicast carriage for public television stations would be consistent with judicial precedent and Commission policy, which recognize a legitimate structural difference between the commercial and noncommercial broadcast service.

First, Section 615 is separate and distinct from Section 614 and includes unique terms that indicate Congressional intent to give public television broader carriage rights. Sections 615 and 614 are entirely separate and distinct from one another and are

[2] See, e.g., § 396(a)(7) ("it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States") and § 396(a)(9) ("it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies").

predicated upon different legislative histories.[3] As a result, the substantive carriage obligations imposed by Section 615 are in many respects significantly broader than those imposed by Section 614. For example, the statutory language that describes "program related" material in the context of public television stations differs in substance from the language regarding program-related content for commercial television stations. Specifically, the Commission has observed that while Section 615(g)(1) generally tracks Section 614(b)(3)(A), the public television provision includes in the definition of "program related" material that "may be necessary for the receipt of programming by handicapped persons or for educational or language purposes."[4] The absence of such language in the commercial counterpart clearly indicates Congressional intent to grant broader carriage rights to public television stations in view of public television's historical commitment to serve these constituencies.

Similarly, there are unique and special provisions in Section 615 that were intended by Congress to ensure the carriage of multiple but differentiated public television services. For example, Section 615(e) mandates that restrictions on the carriage of duplicative programming are to be triggered only if a typical cable system is already carrying three noncommercial broadcast television stations. Moreover, the statute requires the FCC to define "substantial duplication" in a manner that "promotes access to distinctive noncommercial educational television services." A multicast carriage requirement would accomplish precisely the same goal.[5] Other important statutory differences between the carriage obligations imposed on noncommercial and commercial stations, respectively, include differences with regard to the definition of markets for purposes of determining carriage obligations, and the amount of bandwidth required to be devoted to carriage by individual cable systems.[6] These differences are strong evidence of Congress' intent to treat noncommercial and commercial stations differently in this context.

Second, a denial of must carry rights to public television station signals would upset the balance restored by Congress in 1992 when it obligated cable operators to carry

[3] "The two sections have different histories, purposes, degrees of tailoring of means to ends, and different roles to play in a democratic society." Monroe E. Price and Donald W. Hawthorne, Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation, 17 Hastings Comm. & Ent. L. J. 73, 83 (1994). In fact, Section 615 was enacted to substantially reflect an independent agreement reached between the national representatives of public television licensees and the National Cable Television Association.

[4] *See* Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, FCC 01-22, ¶ 122 (rel. January 23, 2001) (comparing 47 U.S.C. §§ 535(g)(1) (public television) and 534(b)(3)(A) (commercial television)).

[5] *Compare* 47 U.S.C. § 535(e) (noncommercial duplication standard) *and* 47 U.S.C. § 534(b)(5) (commercial duplication standard).

[6] *Compare* 47 U.S.C. § 534(h)(1)(C) (commercial cable markets defined in terms of Nielsen DMA's) *and* 47 U.S.C. § 535(l)(2) (50 mile/ Grade B rule for noncommercial cable market definition); and 47 U.S.C. § 534(b)(1)(one-third cap on all local commercial stations) *and* 47 U.S.C. § 535 (no equivalent for noncommercial stations).

the entirety of public broadcasters' free over-the-air broadcast signals as a counterweight to the compulsory copyright license to carry such signals that had existed since 1976. Public television stations operate at a fundamental – and unique— disadvantage as compared to commercial stations in that, unlike commercial stations, *public television stations lack retransmission consent rights* and therefore cannot deny cable operators the right to carry their broadcast signals.[7] Accordingly, in the case of public television broadcasters, must carry rights (and not retransmission consent rights) historically have represented the sole counterweight to cable operators' broad compulsory license rights. Among other things, the must carry rules applicable to public broadcasters, which generally require major cable systems to carry three or more local public television signals, have operated to prevent cable operators from using their compulsory license rights to "cherrypick" for carriage those stations in a market that they view as most desirable. In fact, in the absence of digital must carry rules, certain cable MSOs are doing just this: cherry-picking some stations in a market for carriage while refusing to carry others. While those MSOs may tout their success in reaching voluntary digital carriage agreements with PBS affiliates in certain markets, they conveniently neglect to mention that they have refused to carry second and third public television stations that serve minority and underserved communities in those markets by providing local and independent programming and services, including programming not provided by PBS.[8]

The current imbalance caused by the Commission's 2001 decision has in essence created a market failure for noncommercial educational digital services. By denying digital must carry rights to public television stations, the Commission has upset the balance that was deliberately restored by Congress in the 1992 Cable Act to address the invalidation of FCC cable must carry rules at the time. To rectify this market failure, the Commission should construe Section 615 not in isolation, but as part of the unified federal policy governing public television that conjoins cable operators' compulsory license rights with their mandatory carriage obligations.[9]

Third, for over 30 years, Congress repeatedly has stated and reaffirmed its intent that, as a matter of federal telecommunications policy, public television should have the broadest access to all available telecommunications technologies to ensure universal

[7] *See* 47 U.S.C. § 325(b)(2)(A).

[8] *See* 47 U.S.C. § 396(a)(6) ("[I]t is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities").

[9] *See* Sutherland Stat. Const. § 51.02 (6th Ed.) (collecting cases).

distribution to all Americans.[10] This policy is predicated on Congress' determination that there are additional, unique, unmistakable and strong governmental interests associated with the carriage of public television stations. Indeed, the House Report on the 1992 Cable Act – the very legislation at issue in this proceeding – states that "Congress long has advocated broad access to public television services, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing the amount of educational, informational and local public interest programming available to the nation's audiences."[11]

In the Public Broadcasting Act of 1967, Congress stated that "it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States."[12] In 1978, Congress again stated that "the encouragement and support of noncommercial educational radio and television broadcasting … [are] of appropriate and important concern to the Federal Government,"[13] and that it is in the public interest to "extend delivery of public telecommunications services to as many citizens as possible by the most efficient and economical means, including use of broadcast and nonbroadcast technologies."[14] And in the Public Telecommunications Act of 1992, Congress stated that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies."[15]

This national policy was reiterated and further developed by Congress in 1992, when the cable carriage provisions at issue in this proceeding were established. **In enacting cable carriage obligations as part of the 1992 Cable Act, Congress**

---

[10] In fact the Commission explicitly recognized this in 1990 when it was making recommendations to Congress: "Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them. We believe that mandatory carriage of noncommercial television stations would further this important goal." In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report 1990 FCC LEXIS 4103, 67 Rad. Reg. 2d (P&F) 1771, ¶ 163 (1990).

[11] Cable Television Consumer Protection and Competition Act of 1992, HR Rpt. 102-628, 102nd Cong., 2nd Sess., (June 29, 1992), p. 69.

[12] The Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. § 396(a)(7)).

[13] The Public Telecommunications Financing Act of 1978, Pub. L. 95-567, 92 Stat. 2405 (codified at 47 U.S.C. § 396(a)(4)).

[14] The Public Telecommunications Financing Act of 1978, Pub. L. 95-567, 92 Stat. 2405 (codified at 47 U.S.C. § 390).

[15] The Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (codified at 47 U.S.C. § 396(a)(9)).

reaffirmed the importance of public television, stating that "there is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations."[16] In this regard, Congress explicitly concluded that "the Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems" (a) because public television provides educational and informational programming to the nation's citizens, thereby advancing the Government's compelling interest in educating its citizens; (b) because public television stations are intimately tied to their communities through substantial investments of local tax dollars and voluntary citizen contributions; (c) because the Federal government has invested substantially in the public broadcasting system; and (d) because without carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.[17]

In construing the nature and scope of digital carriage requirements under the 1992 Cable Act, the Commission should give full breadth to Congress' historical and repeatedly affirmed governmental interest in ensuring the widest possible distribution of public television services.

Fourth, public television has been the beneficiary of decades of federal, state and local funding designed to ensure universal service. In the 1992 Cable Act, Congress identified the governmental interest in carriage of public television services as "compelling," stating that "Congress and the American taxpayer have given public television unprecedented support over the last three decades, and public television stations have developed a wide variety of distinctive, award-winning program services. The government has a compelling interest in ensuring that these services remain fully accessible to the widest possible audience without regard for the technology used to deliver these educational and information services."[18]

Most recently, funding for digital conversion has been procured by public television stations based upon the anticipated value and widespread distribution of their digital services. But, as Public Television has demonstrated, without cable carriage of digital services, the educational promise of digital services will lie fallow, and the federal, state and local funds committed to upgrade public television stations in anticipation of

---

[16] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Section 2(a)(7) (emphasis added).

[17] Id. at Section 2(a)(8). Even after the creation of analog cable must carry requirements, Congress continued to ensure that noncommercial educational television services are accessible through many different media, including Open Video Systems and most recently Direct Broadcast Satellite Systems. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 118 (Feb. 8, 1996), (codified at 47 U.S.C. §§ 573(b)(1) and (c)(1)) (open video systems). See also Section 25 of the 1992 Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1503 (Oct. 5, 1992) (codified at 47 U.S.C. § 335(b)) (DBS noncommercial set-aside), and Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (Nov. 29, 1999) (codified at 47 U.S.C. § 338) (DBS local must carry).

[18] Cable Television Consumer Protection and Competition Act of 1992, HR Rpt. 102-628, 102nd Cong., 2nd Sess., (June 29, 1992) p. 69.

providing such services on a widespread basis will have been wasted. This substantial investment at all levels of government indicates a compelling government interest in the preservation of the medium and demands a careful stewardship of the resources already dedicated.

Fifth, public television stations may represent the last true bedrock of locally controlled free, over-the-air media, a unique social role that requires special consideration by the Commission. By statute, and pursuant to policies established by the Commission and adopted by the Corporation for Public Broadcasting, the overarching purpose of public television stations is to serve the public interest by providing educational and informational services to their local communities. To that end, the 357 local public television stations that comprise the decentralized system of public broadcasting in this country are operated by local community foundations, colleges, universities, school districts and state commissions. In addition, many public television stations possess community advisory boards that provide direct feedback from the community regarding stations' performance of and adherence to public television's mission. Moreover, stations' daily business operations are directly funded by donations from local viewers, thereby ensuring community responsiveness in a very concrete financial way.[19] Thus, while cable interests may claim that mandatory digital cable carriage would thwart the "widespread dissemination of information from a multiplicity of sources,"[20] carriage of public television stations would promote localism and diversity.

Sixth, providing digital cable carriage rights to public television at this time based upon the uniqueness of public television would be consistent with judicial precedent and Commission policy that recognize a legitimate structural difference between the commercial and noncommercial broadcast service. Under existing law, the Commission is free to consider crafting digital carriage rules for public television that are based on public television's distinctive statutory treatment and its unique purpose, means of support and method of operation. Importantly, such an approach would not be content-based, as it would not favor noncommercial educational services based on the ideas or views expressed therein.[21] In fact, in 1996 the D.C. Circuit specifically upheld just such a distinction when it held that the set-aside for noncommercial educational programming on direct broadcast satellite systems – set forth in the same 1992 Cable Act that created today's cable must carry statutes—was merely a content-neutral policy that

---

[19] In fact, one-quarter of Public Television's funding comes from individual donations, while only about 15 percent of funding comes from the Federal government. The balance is funded by local businesses, state and local governments, local colleges and universities, and foundations. See www.cpb.org/about/funding/whopays.html.

[20] Ex Parte Letter from Comcast to Marlene Dortch, CS Docket 98-120 (Oct 16, 2003), pp 2-3.

[21] See Turner Broadcasting System v. FCC, 512 U.S. 622, 643 (1994), Satellite Broadcasting and Communications Association v. Federal Communications Commission, et. al., 275 F.3d 337, 354(4th Cir. 2001), cert den. 536 U.S. 922 (2002) (upholding satellite carry-one, carry-all rule), U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) (statute applying only to channels "primarily dedicated to sexually-oriented programming" was impermissibly content-based), and U.S. v. American Library Association, Inc., 123 S. Ct 2297 (2003) (restrictions on access to online pornography are content-based).

"represent[ed] nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming."[22]

The Arts & Entertainment Network's misleading citation to a 1995 D.C. Circuit case concerning the channeling of indecent material is not to the contrary.[23] Although the Court in that case struck down a special provision authorizing some public television stations to broadcast indecent material, it did so because Congress had neglected to articulate any relationship between this authorization, which was not afforded to commercial broadcasters, and the compelling government interests served by banning the broadcast of indecent material at certain times.[24] By way of contrast, as explained above, there is an extraordinary and compelling record of legitimate differential treatment for public television stations when it comes to cable carriage. For over thirty years, public television has been treated differently by Congress and the Commission, not solely because of its perceived value, but mainly because of public television's unique purpose, means of support and operation.

Full digital carriage for noncommercial educational broadcasters would be consistent with current Commission policy, which consistently has granted public television a special status—not to support particular viewpoints or programs, but to preserve a unique media that possess a special relationship with the federal, state and local government as well as the American people.[25] This is especially true in matters

[22] Time Warner Entertainment Co., LP v. FCC, 93 F.3d 957, 976-977 (D.C. Cir. 1996).

[23] "[T]he perceived value of public broadcasting cannot justify preferential regulation that favors noncommercial broadcasters." Letter to Marlene Dortch from A&E Television Networks and Courtroom Television Network, CS Docket No. 98-120, p., 6 (November 5, 2003), citing Action for Children's Television v. FCC, 58 F.3d 654, 668-669 (D.C. Cir. 1995). It is important to note, however, that the case cited says no such thing.

[24] Action for Children's Television v. FCC, 58 F.3d 654, 668 (D.C. Cir. 1995) (holding that Congress had "failed to explain what, if any relationship the disparate treatment accorded certain public stations bears to the compelling Government interest – or to any other legislative value—that Congress sought to advance when it enacted section16(a)"). In that case, the Court reasoned that there was little evidence that indecent material had any less effect on minors when broadcast by public stations between 10 P.M. and midnight (when they signed off), and that Congress had misunderstood the Court's prior rulings by assuming that it was necessary to afford all stations an opportunity to air indecent material, even those that ceased operations before the indecency "safe-harbor" times. Id.

[25] See Television Assignments, Sixth Report and Order, 41 F.C.C. 148, ¶¶ 36 et. seq. (1952) (initial reservation of spectrum solely for noncommercial educational use); 47 C.F.R. § 1.1162(e) (exempting public television from annual regulatory fees); 47 C.F.R. §§ 1.1114(c) and (e)(1) (exempting public television from applications fees; 47 C.F.R. § 73.621 (forbidding the broadcast of commercials); 47 U.S.C. § 399 (ban on supporting or opposing a candidate for political office); 47 U.S.C. § 396(k)(12) (ban on exchange or rent of donor names to political entities); 47 U.S.C. § 312(a)(7)(exempting public broadcasters from free airtime requirements of Communications Act).

affecting the digital transition.[26] As the Commission has stated before, "[t]he current dual system of broadcasting consisting of commercial and noncommercial stations is dependent upon differences in the purpose, support and operation of the two classes of stations."[27] Accordingly, the FCC may extend this tradition of special but content-neutral treatment to the issue of digital carriage.[28]

###

[26] "We ... acknowledge the financial difficulties faced by noncommercial stations and reiterate our view that noncommercial stations will need and warrant special relief measures to assist them in the transition to DTV. Accordingly, we intend to grant such special treatment to noncommercial broadcasters to afford them every opportunity to participate in the transition to digital television, and we will deal with them in a lenient manner." Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 104 (1997).

[27] In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, Second Report and Order, 86 F.C.C. 2d 141, ¶ 15 (1981).

[28] Consequentially, A&E's reference to Public Television's broadcast flag comment is likewise irrelevant. *See* Letter to Marlene Dortch from A&E Television Networks and Courtroom Television Network, CS Docket No. 98-120, p., 6 (November 5, 2003). Public Television indeed did object to content-based regulation in the context of proposals that the Commission exempt public affairs programming from the broadcast flag. However, we have demonstrated that differential cable carriage rules would not be content-based, but would be based on structural differences in purpose, support and operation between the noncommercial educational broadcast service and the commercial broadcast service, a legitimate distinction long recognized by Congress, the Judiciary and the Commission.

For all of the above reasons, the Commission possesses the legal authority to create digital carriage rules that take into consideration the unique circumstances and needs of public television stations now.

Respectfully submitted,

_/s/ Lonna M. Thompson_____ Lonna M. Thompson Vice President and General Counsel Andrew D. Cotlar Senior Staff Attorney Association of Public Television Stations 666 Eleventh Street, NW, Suite 1100 Washington, D.C. 20001 www.apts.org Telephone: 202-654-4200 Fax: 202-654-4236	_/s/ Donna Coleman Gregg_____ Donna Coleman Gregg Vice President, General Counsel and Corporate Secretary Robert M. Winteringham Senior Staff Attorney Corporation for Public Broadcasting 401 Ninth Street, NW Washington, DC 20004 www.cpb.org Telephone: 202-879-9600 Fax: 202-879-9694
December 8, 2003	_/s/ Katherine Lauderdale_____ Katherine Lauderdale Senior Vice President and General Counsel Paul Greco Vice President and Deputy General Counsel Public Broadcasting Service 1320 Braddock Place Alexandria, Virginia 22314-1698 www.pbs.org Telephone: 703-739-5000 Fax: 703-837-3300

cc: Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Catherine Crutcher Bohigian
Jon Cody
Stacy Robinson Fuller
Jordan Goldstein,
Johanna Mikes
Rick Chessen
Kenneth Ferree
Jane Mago
John Rogovin